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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

B5

DATE: JUL 2 3 2012 OFFICE: TEXAS SERVICE CENTER [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The petitioner appealed that decision to the Administrative Appeals Office (AAO). The AAO withdrew the director's decision and remanded the matter for a new decision. The director again denied the petition and certified the decision to the AAO for review. The AAO will affirm the director's decision to deny the petition.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability in the arts. The petitioner seeks employment as a motion picture producer and director. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner does not qualify for classification as an alien of exceptional ability in the arts, and has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

The petitioner filed the Form I-140 petition on December 30, 2005. The director denied the petition on July 1, 2006, stating that the petitioner had not established eligibility for the national interest waiver. The director, in the 2006 decision, did not say whether or not the beneficiary qualified for the underlying immigrant classification. The petitioner appealed the decision. The AAO remanded the petition to the director on June 20, 2007, stating that the director had issued an incomplete decision with no substantive discussion of the evidence of record. The director again denied the petition on May 31, 2012, and the petitioner has filed a timely response to the certified denial notice.

In response to the certified denial, the petitioner submits a brief from counsel and supporting exhibits.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

EXCEPTIONAL ABILITY IN THE ARTS

The first issue in this proceeding is whether the petitioner qualifies for the immigrant classification sought, either as a member of the professions holding an advanced degree or as an alien of exceptional ability in the sciences, arts or business. The petitioner has not claimed to be a member of the professions holding an advanced degree, and so the AAO need not offer any analysis in that regard. The petitioner, through counsel, claims to be an alien of exceptional ability in the arts.

The U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 204.5(k)(3)(ii) states that, to show that the alien is an alien of exceptional ability in the sciences, arts, or business, the petition must be accompanied by at least three of the following:

> (A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;
>
> (B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought;
>
> (C) A license to practice the profession or certification for a particular profession or occupation;
>
> (D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;
>
> (E) Evidence of membership in professional associations; or
>
> (F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

In addition to satisfying at least three of the above standards, the petitioner's evidence must show that the petitioner meets the regulatory definition of exceptional ability. The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor.

Where the petitioner fails to submit the requisite evidence, the proper conclusion is that the petitioner failed to satisfy the regulatory requirement of three types of evidence. *See Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (a decision pertaining to section 203(b)(1)(A) of the Act but containing legal reasoning pertinent to the classification in the current matter before the AAO). If the petitioner has submitted the requisite evidence, USCIS makes a final merits determination as to whether the evidence demonstrates "a degree of expertise significantly above that ordinarily encountered." *Id.* at 1121, 1122, *aff'd Rijal v. USCIS*, --- F.3d ----, 2012 WL 2130884 (C.A.9 (Wash.)).

The AAO now turns to the petitioner's evidence relating to the six criteria at 8 C.F.R. § 204.5(k)(3)(ii). With respect to the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(A), the petitioner's only claimed academic

degree is in civil engineering, a field unrelated to motion picture direction and production. The petitioner makes no claim of licensure or certification under the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(C). The petitioner, through counsel, has claimed throughout this proceeding that he meets the remaining four criteria. The director concluded that the petitioner meets none of them.

> *Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought.* 8 C.F.R. § 204.5(k)(3)(ii)(B)

The petitioner's initial submission included Form ETA-750B, Statement of Qualifications of Alien. Section 15 of that form, "Work Experience," instructed the petitioner to "list any . . . jobs related to the [alien's intended] occupation." The petitioner listed two jobs, both in Seoul, South Korea: as a [redacted] from January 1, 1988 to December 31, 1990, and as a director for [redacted] from January 1, 1991 to present. The petitioner signed the Form ETA-750B, thereby declaring under penalty of perjury that the information on that form is true and correct.

In a brief accompanying the initial filing, counsel cited exhibits 1, 11 and 13 to show the petitioner's "fifteen year career as a film director." The materials include a filmography going back to 1992, but no evidence to show that his experience has been full-time as the regulation requires. The identified exhibits are not letters from current or former employers, as required by the plain language of the regulation. Exhibit 13 is the petitioner's own *curriculum vitae* for 2004 and 2005, and exhibits 1 and 11 are brochures prepared by (or for) the petitioner. The various exhibits, taken together, indicate that the petitioner began working as an [redacted]' in 1984, and as an [redacted] in 1991, before becoming "a Freelancer" in 1996 and founding [redacted] in 2000.

The petitioner's initial submission also included a letter from [redacted], president of [redacted], who stated that the petitioner "joined the [redacted] in 1991" as a "Director." The letter identified projects both before and after 1991, but did not specify how long the petitioner worked for [redacted], or whether the petitioner worked full-time.

The USCIS regulation at 8 C.F.R. § 103.2(b)(2)(i) reads:

> The non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document, such as a birth or marriage certificate, does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, such as church or school records, pertinent to the facts at issue. If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.

The petitioner did not explain why letters from current or former employers were not available. Therefore, the petitioner's initial submission did not conform to the regulatory requirement at 8 C.F.R. § 204.5(k)(3)(ii)(B).

The exceptional ability criteria did not resurface in the proceeding until after the AAO's remand notice of June 20, 2007. In a request for evidence (RFE) dated December 6, 2011, the director instructed the petitioner to submit "[e]mployment verification letters on official employer letterhead" from his various employers, specifying dates of employment and the duties the petitioner performed.

In response, the petitioner submitted six new certificates, showing the following employment first as a television director and then, since 2003, as chief executive officer of [redacted]

Employer named on certificate	Employment dates	[redacted]
[redacted]	12/15/1984 – 4/24/1991	5/2/1990 – 12/27/1990
	5/1/1991 – 5/15/1996	2/4/1992 – 2/19/1996
	[not specified]	4/19/1997 – 11/15/1998
	[not specified]	3/14/2001 – 1/9/2003
	[not specified]	5/31/2003 – 3/16/2006
	[not specified]	7/29/2006 – 7/10/2011

The petitioner also submitted a letter from [redacted] chief financial officer and vice president of [redacted]., stating that the petitioner "has been employed with [redacted] from December 01, 2000 to the present as our Executive Producer/Director. Since July 01, 2004, he also served as our [redacted]" None of the letters and certificates specified continuous, full-time employment of the petitioner. The spans of broadcast dates include lengthy intervals between programs. The certificate from [redacted], for instance, indicated that one of the petitioner's television programs aired until June 8, 1997; his next named project did not begin to air until nine months later, on March 7, 1998. The certificates do not indicate what, if anything, the petitioner was doing between those dates. Certainly there is a lag between completion of filming and broadcast, but that also means that the petitioner was not necessarily working on days when the networks broadcast his programs. The AAO notes that the certificate from [redacted] indicated that the petitioner started working there as a director in 1984, but it did not identify any of the petitioner's work broadcast before 1990.

In the certified denial decision of May 31, 2012, the director stated that the employment certificates do not match the employment that the petitioner previously claimed on Form ETA-750B. On that form, the petitioner claimed employment at [redacted] from January 1988 to December 1990, and at [redacted] thereafter, with no other employment claimed. One of the certificates from [redacted], however, shows employment from December 1984 to April 1991, and several certificates are from employers not named on Form ETA-750B. The letter from [redacted] indicated that the petitioner's employment there began in December 2000, nearly a decade later than the date that the petitioner claimed on Form ETA-750B. The director concluded that the petitioner's contradictory claims lacked credibility, and therefore the petitioner had not satisfied the requirement at 8 C.F.R. § 204.5(k)(3)(ii)(B).

The director cited *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988), which states that inconsistent claims undermine the petitioner's overall credibility and that it is the petitioner's responsibility to provide reliable evidence to establish where the truth lies. *See id.* at 591-92. The director also cited *Matter of Leung*, 16 I&N Dec. 12 (BIA 1976), which states that newly-claimed employment not listed on the labor certification or visa petition is not credible. *See id.* at 14-15.

In response to the certified denial notice, counsel states: "It appears that clerical error is responsible for the inconsistencies but some of the experience [redacted] was on a freelance basis that overlapped other experience and is not inconsistent." Counsel does not explain why the petitioner submitted documents containing "clerical errors," either knowing that they contained incorrect information, or without examining them first for accuracy.

Counsel attempts to distinguish the two cited precedent decisions from the present proceeding, and observes that *Matter of Leung* has been overturned and superseded by *Matter of Lam*, 16 I&N Dec. 432 (BIA 1978). The AAO notes that *Lam* overturned *Leung* specifically over the question of whether an alien can qualify for labor certification based on unlawful prior employment in the United States. *See Matter of Lam*, 16 I&N Dec. 434. The *Lam* decision does not address the ancillary finding in *Leung* that newly-claimed employment, not listed on a petition or labor certification, lacks credibility.

Counsel asserts that, in both *Leung* and *Ho*, the credibility issues arose from "sparse records," whereas the petitioner, counsel claims, has submitted ample evidence that "clearly establishes [the petitioner's] more than 20 years of experience in his field." Counsel seems to imply that, as long as there is evidence going back more than ten years, that evidence need not be internally consistent in order to satisfy the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(B). Counsel does not explain why contradictory evidence is more credible than "sparse evidence." Counsel cannot simply dismiss the inconsistencies by attributing them to "clerical error" without elaboration and without submitting, as *Ho* demands, objective, reliable evidence to show where the truth lies.

The petitioner has submitted evidence of a film career that spans more than ten years, but he has not submitted letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought. The submitted evidence does not show ten years of full-time employment (as opposed to intermittent bursts of activity spanning a period of at least ten years), and the petitioner has not resolved the credibility issues that inevitably result from contradictory or inconsistent claims.

> *Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability.* 8 C.F.R. § 204.5(k)(3)(ii)(D)

The petitioner's initial submission included a September 21, 2005 "Certificate of Income" from the [redacted] in both Korean and English, indicating that the petitioner's total income for 2004 was KRW 1,419,159,877. A [redacted] indicated: "The currency exchange rate for the Korean won has been stable over the past two years approximately 1100 won to the U.S. dollar. The 1.4 billion won earned by [the petitioner] in 2004 is approximately $1.3 million."

The above evidence, however, fails on two points. First, the petitioner submitted nothing to show that he received the above amount as a salary or other remuneration for services as a film director and/or producer. Second, the petitioner provided no evidence to allow for a comparison between his income and that of other motion picture director/producers. Therefore, the petitioner established his earnings for 2004, but did not show that the amount constitutes salary or other remuneration which demonstrates exceptional ability.

In the December 2011 RFE, the director noted that the "Certificate of Income" "does not report the beneficiary's occupation or source of income." The director instructed the petitioner to "[s]ubmit independent objective evidence that the 1.4 billion won was paid to the beneficiary for his work as a director" and "independent objective evidence of the average salary for a director in South Korea." The director also requested independent verification of the claimed currency exchange rate.

In response, the petitioner submitted a new "Certificate of Income" for 2010, which did not address the director's concerns about the previous certificate. A printout from a currency exchange rate web site substantiated the prior claim about the won-dollar exchange rate, showing fluctuations between 1,130 and 1,180 won to the dollar during December 2011 and early January 2012.

The petitioner also submitted a letter from [redacted], who claimed that the petitioner earned a "high payroll, 2 to 10 times higher than average TV series directors while he directed TV series since 1990." The petitioner did not submit documentary evidence to corroborate these general figures, or to show that [redacted] has sufficient reliable knowledge of television director pay rates to be able to draw the stated conclusion. The record does not show what proportion of the petitioner's income is from television production/direction, or provide baseline figures for average earnings in those fields in South Korea.

In the certified decision of May 2012, the director found that "the petitioner failed to submit evidence that the wages earned by the beneficiary in 2004 were earned for work in the area of exceptional ability," and that the letter from [redacted] lacked "specific information, such as the amount of wages earned by the beneficiary, and the average amount of wages earned by directors in Korea." The director also noted that the petitioner submitted exchange rate information for 2011, rather than for 2004. The director, therefore, concluded that the petitioner had not satisfied the requirement at 8 C.F.R. § 204.5(k)(3)(ii)(D).

In response, the petitioner submits exchange rate information showing that, in 2004, a United States dollar was worth roughly 1,100 won as claimed previously. The petitioner has overcome this element of the director's finding, but there remains the director's more serious observation that "the Certification of Income and Taxes does not report the beneficiary's occupation or source of income."

Counsel maintains that "[t]he 2004 tax record already establishes that [the petitioner's] annual income is in excess of $1 million. . . . The 2010 income record demonstrates that [the petitioner] continues to earn a high income." The income figures for 2004 and 2010 do not demonstrate or imply that the petitioner earned similar sums in other years. The petitioner has not shown that the 2004 and 2010 figures are typical of his annual earnings in other years, let alone that those earnings came entirely or mostly from his film work.

Counsel states that the director's finding "penalizes [the petitioner] for the fact that South Korean income records apparently do not set forth the source of earnings." This assertion would have more weight if counsel were somehow able to prove that the Certificates of Income are the only available documentation of the petitioner's earnings. The petitioner has not submitted copies of checks, bank records, contracts, or any other documentation to show who paid him, and for what. He has not established that the year-end figure for 2004 represents remuneration for his work as a producer/director.

The petitioner does not overcome the director's finding that the petitioner failed to provide information to allow a comparison between the petitioner's earnings and those of others in the field in South Korea. Counsel's only comment on this matter is to state: "We submit that a director who makes two to ten times as much as other directors has demonstrated remuneration consistent with exceptional ability and that the average earnings of directors (a statistic that may not exist) is not required to make this determination." Counsel, here, treats the claim in [redacted]s letter as an accepted fact. Counsel, thus, simultaneously makes two conflicting assertions: the petitioner earns more than other directors, and it is impossible to say how much other directors earn.

It remains that [redacted] did not explain the source of the "2 to 10 times" figure. Either this information came from a reliable source that can be identified and documented, or it is an arbitrary estimate with no demonstrated basis in fact. The lack of supporting documentation, even after the director's request for it, is not a trivial matter.

The AAO affirms the director's finding that the petitioner has not submitted evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability.

Evidence of membership in professional associations. 8 C.F.R. § 204.5(k)(3)(ii)(E)

The petitioner's initial submission included three certificates intended to satisfy this criterion. One certificate confirms that the petitioner "is an [redacted] The second certificate shows that the petitioner is a member of the [redacted] The third certificate does not establish the petitioner's membership in any association. Rather, it reads, in part:

Certificate of Nomination

Upon recommendation of the organization here by confers upon
[The petitioner]
[redacted] of the production

We honor above person as [redacted] of the production
at [redacted] [*sic*]

The imperfect English of the quoted certificate makes it difficult to determine the certificate's exact purpose, but [redacted] appears to be a television network rather than a professional association.

In the December 2011 RFE, the director noted the petitioner's submission of two membership certificates, and stated:

> The petitioner did not submit evidence concerning the associations. . . . [T]he petitioner did not show that the associations are professional associations. In addition, the petitioner did not show that the associations are associations for film directors.

The director instructed the petitioner to submit "[d]ocumentary evidence which shows the associations are professional." In response, the petitioner submitted the following materials:

- A "Certification of Member" stating that the petitioner belonged to the [redacted] from December 15, 1984 to May 15, 1996.
- A translated excerpt from the [redacted] web site, describing the association.
- A [redacted] membership certificate dated August 23, 2011.
- Background information describing the [redacted]
- An English-language printout from the [redacted] web site, identifying the association as "the leading collective management organization for the musical works in Korea," looking after "music copyright which represents music creators' rights."

Most of the above materials concern newly-claimed organizations that the petitioner did not mention in his initial submission. The certificate from the [redacted] dates from several years after the petition's December 2005 filing date, and it does not state when the petitioner joined the association. Therefore, it is not evidence that the petitioner already belonged to the [redacted] at the time of filing the petition. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request. 8 C.F.R. § 103.2(b)(1). USCIS cannot properly approve the petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

In all, the petitioner's initial submission and his response to the 2011 RFE show three memberships as of the petition's filing date or earlier, in the [redacted], the [redacted] and the [redacted].

In the May 2012 certified decision, the director found that the petitioner had only established that one of the above three associations is a professional association in the field of television production and/or direction. The director observed that the [redacted] deals with "musical works," and found: "The petitioner has not established that an association for musical works is a professional association for movie producers and directors." The director also found that the petitioner submitted no information about the [redacted] Therefore, the director concluded that the petitioner had established membership in one professional association, rather than the plural "associations" required by the plain wording of the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(E).

In response to the certified denial decision, the petitioner submits a [redacted] dated September 9, 2005 from the [redacted]. Counsel states that this certificate accompanied the initial submission and the director failed to take it into consideration.

The initial submission contains nothing from the [redacted] and the exhibit list that accompanied the initial submission did not mention such a certificate. Counsel refers to the new submission as "an additional copy," but the certificate is an original document in black ink, with a stamp in red ink that has partially bled through the page; it is not a "copy" of a previously submitted document.

The previously submitted certificate from the [redacted] is also dated September 9, 2005. Both certificates show the same street address, and the names of the two organizations are similar enough that they could conceivably be variant translations of the same Korean organization name. There are also very significant differences, however. The two certificates show the same street address, but the earlier certificate places the [redacted] on the "15th FL.," whereas the new certificate places the [redacted] in "6F" – either a suite identifier or a reference to the sixth floor. The two certificates show different telephone and facsimile ("fax") numbers.

Furthermore, it is far from clear why an organization would issue two very different membership certificates on the same date. (The [redacted] certificate shows an "Entry Date" of June 18, 2004, meaning that September 9, 2005 is the date of the certificate, not the date membership commenced.) Also, the new certificate does not indicate that the petitioner is a member of the organization. Rather, it says: [redacted] is currently a member of [redacted]' and that the petitioner is the organization's "Representative." Hence, the [redacted]s members are companies rather than individuals. In sum, the new [redacted] certificate raises more questions than it answers. All of the director's concerns about the lack of information about the [redacted] also apply to the [redacted]

With respect to the director's observation that the [redacted] is an organization of songwriters, not producer/directors, counsel states that "music is an essential element of both motion pictures and television" and therefore the petitioner's membership in the [redacted] "is clearly membership in a field within his industry." This *ad hoc* argument is tenuous and unpersuasive. The issue is not whether "music" and "film" are somehow related, but whether membership in a songwriter's association has a direct, rational connection to film production or direction. The AAO observes that the petitioner claims, quite apart from his film work, to have written the lyrics of a popular song [redacted]. The AAO therefore concludes that the petitioner belongs to the [redacted] not because he is a film producer/director, but because he is a songwriter.

Nevertheless, the AAO notes that the plain wording of the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(E) simply requires "[e]vidence of membership in professional associations"; it does not require those associations to be in the petitioner's area of claimed exceptional ability. Therefore, the appropriate course of action would have been to grant that the petitioner's [redacted] membership qualifies under the strict wording of the regulation, but that it cannot survive a final merits determination because membership in an organization devoted to music copyrights does not demonstrate "a degree of expertise significantly above that ordinarily encountered" in the field of film production/direction. The petitioner's consideration of the issue as a basic evidentiary matter, rather than a final merits issue, amounts to harmless error. *See Rijal v. USCIS*, 772 F. Supp. 2d 1339, 1347-48 (W.D. Wash. 2011) *aff'd*, --- F.3d ----, 11-35249, 2012 WL 2130884 (9th Cir. June 13, 2012). *See also Kazarian v. USCIS*, 596 F.3d 1122.

Although the petitioner has submitted no evidence about the nature of the [redacted] on its face it appears to be a professional association of broadcast producers. The [redacted] likewise appears to be a professional association, which is all that the regulation requires. The director acknowledged the petitioner's membership in [redacted] Therefore, under the two-part *Kazarian* test affirmed in [redacted], the petitioner has established membership in professional associations. If the petitioner meets two other regulatory standards of exceptional ability, then a final merits determination will be necessary in order to evaluate the evidence submitted.

> *Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.* 8 C.F.R. § 204.5(k)(3)(ii)(F)

Counsel cited initial exhibits 1, 3, 7, 8, 9 and 10 as evidence under the above regulation. Exhibit 3 is a list of awards that the petitioner claims to have received between 1988 and 2004. As previously noted, exhibit 1 is a brochure about the petitioner. That brochure includes photographs of three English-language certificates: a [redacted] from the [redacted] 1995, for [redacted] 1997, for [redacted] and a 1996 [redacted] certificate (no category specified) from the New York Festivals, again for [redacted] The petitioner's name is not on any of these certificates. Rather, each award identified the recipient as [redacted].

Not all of the claimed awards were in the field of directing or producing motion pictures. One award was for writing song lyrics, and another was for writing a "Bestseller." Awards in fields other than film production and direction cannot establish exceptional ability in film production and direction.

The brochure includes photographs of other award certificates and statues, all in the Korean language without the complete, certified translation required by 8 C.F.R. § 103.2(b)(3). Also in the brochure were photographs of untranslated articles from unidentified Korean-language magazines and/or newspapers.

Exhibits 7 through 10 are witness letters, two of which mention specific recognition for achievements and contributions (the other two letters offer more general assertions of acclaim). The AAO has previously mentioned the letter from [redacted] who stated: "In 1996, [the petitioner] received the [redacted]. Other accolades include a [redacted] [*sic*] at [redacted], once in 1995 for his drama, [redacted]' and another in 1997 for his television series, [redacted]' An almost identical passage (including the reference to "a Golden Awards") appears in a letter from [redacted] president of [redacted]

The director, in the December 2011 RFE, stated that the petitioner's submission of "pictures of awards and partial articles concerning the awards" was not sufficient to establish qualifying recognition. The director requested additional documentary evidence to establish the nature of the awards and the petitioner's receipt thereof, and to corroborate prior witnesses' claims.

In response, the petitioner submitted larger copies of the two certificates from [redacted] and the certificate from the New York Festivals, along with explanatory documents of uncertain origin about each certificate. The documents do not appear to be from the festival organizations themselves; all three share a common format and feature general information about the festivals in grammatically correct English, and information about the petitioner's films in grammatically poor English. The information about [redacted] document, for example, reads:

> [redacted] awarded the second [redacted] this time.
> The [redacted]' is a story of a [redacted] but got over it by patience – the prototype of typical old day's Korean woman (Mother).
> The [redacted] have renown globally again, after it won the New York Festival in 1996.

As before, nothing from the festival organizations states that the petitioner received any award.

The petitioner also submitted translations of four certificates from [redacted] which do show his name:

- Outstanding Evaluation Award: Performance [redacted], 1992
- Outstanding Evaluation Award: Individual Producer [redacted], 1994
- Production Award (Outstanding performance) [redacted], 2001
- Production Award (Outstanding performance) [redacted], 2003

A fifth certificate indicates that [redacted] (apparently a variant spelling of [redacted]) Broadcasting Company presented an [redacted]' to the production team behind [redacted] in 1990.

The director, in the May 2012 certified decision, found the above evidence to be insufficient because "the petitioner failed to submit evidence that shows the criteria used to give the prizes or awards; the significance of the prizes or awards . . . ; the reputation of the organization granting the prizes or awards; who is considered for the prizes or awards . . . ; how many prizes or awards are awarded each year; and media attention [for] the prizes or awards."

In response to the decision, counsel states: "The denial decision recognizes [the petitioner's] receipt of numerous international prizes (New York and Houston Film Festivals) as well as recognition in [redacted] for multiple years." The evidence, however, does not show that the petitioner received the film festival awards. The film festival award materials themselves mention only the titles of the films and the network [redacted] that broadcast them, not the petitioner, and the explanatory documents show no evidence of preparation or issuance by the United States entities that held the film festivals.

Counsel protests that the petitioner identified the web sites for the festivals in the United States (http://www.worldfest.org and http://www.newyorkfestivals.com), but "[a]pparently, the adjudicator did not bother to visit the actual website addresses." The AAO searched the two web sites. The sites

contain background information about the awards, as counsel claims. It is significant, however, that the site identified for the New York Festivals contains no information about the petitioner or [redacted], and does not indicate that [redacted] or any other Korean entrant won any award in 1996. It is not clear whether the searchable database marked [redacted] includes finalists.[1] The [redacted] site identifies [redacted] as one of [redacted], and [redacted] as a winner of one of [redacted] awards in 1997, but there is no mention of the petitioner.[2] Counsel maintains that the petitioner's connection with the television programs makes him the recipient of the awards, but the record contains no evidence that either WorldFest or the New York Festivals recognized the petitioner for achievements or contributions to the industry or field.

Despite the ambiguity of the evidence regarding the petitioner's claimed United States awards, he has submitted more definitive evidence of recognition from [redacted]. A number of the director's concerns about the specifics of the petitioner's awards are more properly addressed as final merits concerns, because the plain wording of the USCIS regulation at 8 C.F.R. § 204.5(k)(3)(ii)(F) requires only evidence of recognition. The AAO finds that the petitioner has satisfied the plain wording of the regulation.

The AAO also finds, however, that even under the two-part *Kazarian* test, the petitioner has met only two of the six regulatory criteria. Specifically, the petitioner has documented membership in professional associations (8 C.F.R. § 204.5(k)(3)(ii)(E)) and recognition for achievements or contributions to the industry or field (8 C.F.R. § 204.5(k)(3)(ii)(F)). For reasons already explained, the petitioner's evidence of past employment (8 C.F.R. § 204.5(k)(3)(ii)(B)) and salary or remuneration (8 C.F.R. § 204.5(k)(3)(ii)(D)) is deficient and does not meet the regulatory threshold.

Had the petitioner submitted the required evidence under at least three evidentiary categories, in accordance with the *Kazarian* opinion, the next step would be a final merits determination that considers all of the evidence in the context of whether or not the petitioner has demonstrated "a degree of expertise significantly above that ordinarily encountered" in his field. 8 C.F.R. § 204.5(k)(2); *see also Kazarian,* 596 F.3d at 1119-20. While the AAO concludes that the evidence does not demonstrate the required degree of expertise, the AAO need not explain that conclusion in a final merits determination.[3] Rather, the proper conclusion is that the petitioner has failed to satisfy the regulatory requirement of three types of evidence. *Id.* at 1122. For the reasons discussed above, the AAO affirms the director's finding that the petitioner has failed to establish exceptional ability in the arts as a producer/director of motion pictures.

NATIONAL INTEREST WAIVER

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[1] The search page is located at [redacted]

[2] Sources: [redacted] (excerpts added to record July 18, 2012).

[3] The AAO maintains de novo review of all questions of fact and law. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In any future proceeding, the AAO maintains the jurisdiction to conduct a final merits determination as the office that made the last decision in this matter. 8 C.F.R. § 103.5(a)(1)(ii). *See also* section 103(a)(1) of the Act; section 204(b) of the Act; DHS Delegation Number 0150.1 (effective March 1, 2003); 8 C.F.R. § 2.1 (2003); 8 C.F.R. § 103.1(f)(3)(iii) (2003); *Matter of Aurelio*, 19 I&N Dec. 458, 460 (BIA 1987) (holding that legacy INS, now USCIS, is the sole authority with the jurisdiction to decide visa petitions).

The second and final issue under consideration in this proceeding concerns the petitioner's application for an exemption, in the national interest, of the statutory job offer requirement. The petitioner cannot qualify for the national interest waiver if he does not also qualify for the underlying immigrant classification, but the director addressed the waiver claim in detail and the AAO will do so here.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now USCIS] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

In re New York State Dept. of Transportation, 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also reiterates that notes that USCIS defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. 8 C.F.R. § 204.5(k)(2). By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, an alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

Counsel, in his introductory statement, stated:

> [The petitioner's] films have been immensely successful throughout Asia. . . .

> [The petitioner] will film [redacted] dramas in the United States for a primarily [redacted] audience. Scenes will be shot at locations well-known and of interest to a [redacted] audience such as [redacted]. Although by necessity Korean actors and actresses will star in these films, opportunities will abound for English-speaking roles, extras, technical workers, and an entire supporting workforce. . . .
>
> The record in this case is clear that [the petitioner] has achieved a status in his profession significantly above his professional peers. This is the conclusion reached by each of the four distinguished persons who have contributed opinion letters and is further supported by the numerous and significant awards and recognitions garnered.

Counsel, as quoted above, indicated that the waiver application largely rested on four witness letters that accompanied the initial filing of the petition. The AAO has already discussed some of these letters. [redacted] stated:

> [The petitioner] is one of [redacted] most prominent [redacted] [The petitioner] is known worldwide for his hugely successful syndicated [redacted] . . . , which were hits throughout East Asia including Japan, China, Hong Kong, Indonesia, Vietnam, and the Philipines [*sic*]. He is known by his counterparts in the industry as a [redacted], culture, and lifestyle to the rest of the world. In 1992, he directed [redacted]" which became the most popular drama series [in] China. . . .
>
> Through [the petitioner's] efforts, the beauty of Korean culture and lifestyle has been spread to a world audience and has transformed [redacted] from a domestic Korean powerhouse network into a global force. . . .
>
> As colleagues of [the petitioner], we have eye witnessed his immense contributions to our industry and can state that his stature and reputation among his peers is of the highest order.

[redacted] chairman and chief executive officer of [redacted], stated:

> [The petitioner] is an internationally acclaimed [redacted] whose work has received both critical and popular acclaim here in Japan and throughout Asia. . . .
>
> [redacted] obtained publishing rights in Japan for a book version of [the petitioner's] drama series [redacted] in 2004. The publication far exceeded all initial expectations and sold over 250,000 copies (typically, books selling over 100,000 copies are considered "bestsellers" in Japan). As a television drama series, [redacted] was consistently rated the top popular television drama amongst the general public in Japan.

> [The petitioner's] talent emanates from his constant focus on projects that deliver meaningful messages to his audience. . . . [His] two most popular projects [redacted] have rightfully earned him a reputable name internationally.

[redacted] television executive [redacted] claimed that the petitioner "is recognized as the first pioneering director to [redacted] productions to the Chinese domestic market," and identified [redacted] as highly popular productions. [redacted] asserted: "Especially in China, these Korean films and dramas have brought understanding and brotherhood between these two countries that historically always seem to clash culturally. [The petitioner] can be directly credited for contributing to the harmony and new familiarity between the Korean and Chinese people."

[redacted], writer/producer/director with [redacted], stated:

> I have known [the petitioner] for many years and I've always admired his talent and good taste as a consummate craftsman in his field. Of all the [redacted]s, he is by far the most proficient and successful, artistically and financially, as evidenced by his beautiful films [redacted]" and "[redacted]," both received with high acclaim.
>
> It is [the petitioner's] desire to direct films in the US, bringing with him his knowledge and experience in Korean culture and artistic endeavors. He intends to direct films that combine the cultural heritage of S. Korea with American topics. It will create a new source of work for American actors and technicians, while cementing the relationships between the two nations. To fulfill this plan, we need the talents of a director well versed in Korean customs and traditions, and I cannot think of anyone more qualified than [the petitioner].

The letters quoted above contain numerous claims of fact unsupported by primary evidence. The [redacted] has held that testimony should not be disregarded simply because it is "self-serving." *See, e.g., Matter of S-A-*, 22 I&N Dec. 1328, 1332 ([redacted] 2000) (citing cases). The [redacted] also held, however: "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available." *Id.* If testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998).

The opinions of experts in the field are not without weight and have received consideration above. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may, as above, evaluate the content of those letters as to whether they support the alien's eligibility. USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *See id.* at 795; *see also*

Matter of V-K-, 24 I&N Dec. 500, 502 n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). The letters considered above primarily contain claims of the petitioner's wide-ranging influence, for which supporting documentary evidence ought to be readily available. Such evidence, however, is not to be found in the record.

On May 19, 2006, the director issued an RFE, instructing the petitioner to submit evidence to meet the guidelines set forth in [redacted]. In response, the petitioner submitted evidence about the film industry to establish its intrinsic merit and national scope. With respect to the petitioner as an individual, counsel quoted the four previously submitted witness letters and listed the awards documented in the initial submission.

The director denied the petition on July 1, 2006, stating: "Although the petitioner/beneficiary has been shown to be a competent; [*sic*] a leading film director whose skills and abilities are of value, it has not been established that a job offer waiver based on national interest is warranted." The petitioner appealed that decision, protesting (through counsel) that the decision did not contain "a single sentence of analysis" to explain the grounds for denial. The AAO agreed with counsel that the decision was insufficient, and withdrew the director's decision on June 20, 2007, remanding the matter for a new decision. The AAO raised several points for the director to consider:

> As the national interest contemplates a prospective national benefit, the director shall consider whether the petitioner, in the United States pursuant to a nonimmigrant treaty investor visa, has the intent and means to produce the proposed movies in the United States. For example, the director may wish to inquire as to whether the petitioner has a producer, funds and screenplays to make future movies. While Citizenship and Immigration Services (CIS) may waive the alien employment certification / job offer in the national interest, the visa classification is still an employment based visa classification and the waiver hinges on the alien's intent and ability to pursue the work claimed to be in the national interest. The bare, general assertion that petitioner intends to make movies cannot and does not have the same weight as documentary evidence showing that specific plans (and funding) are in place for specific projects.
>
> Even if the petitioner is able to provide evidence of the intent and means to pursue movie directing in the United States, simply identifying a particular film project or projects will not, by itself, demonstrate eligibility for the waiver. There exists no blanket waiver for filmmakers, and therefore it cannot suffice for the petitioner simply to claim that he will benefit the United States by making movies here. Among other issues the director may choose to raise, the director shall consider whether the petitioner has a track record of success, not just as a movie director, but providing the type of national benefit he alleges will accrue from his work in the United States, promoting the areas where the movies are filmed.
>
> Finally, it is noted that the petitioner seeks permanent residence to complete what appears to be proposed short-term or temporary projects. The director may inquire as to why

> nonimmigrant visa categories, such as the one that allowed the petitioner to film a previous movie in the United States, do not provide the petitioner the necessary means for completing these short-term projects.

The director raised several of the above points in a second RFE, issued December 6, 2011. The director emphasized that the petitioner must submit evidence to support any claims about the past or future benefit arising from the petitioner's work.

In response, counsel stated:

> The record as now augmented establishes that [the petitioner] has a long record of achievement in the field of film directing. His production company has an established record of international success (see Exhibit "H"). His film projects have benefited the economies of the filming locations (see Exhibit "I"). He has received international recognition by such prestigious organizations as the [redacted] and [redacted] It is clear that his past record justifies projections of future benefit to the nation.
>
> The record as now augmented shows a concrete business plan for the formation of a permanent drama production [company] in the United States headquartered in [redacted] to continuously produce TV mini-series targeting both the [redacted] markets (see Exhibit "A"). Evidence has been provided of arranged funding for film projects (see Exhibit "F"). A detailed plan for creating employment for U.S. workers has been developed (see Exhibit "D"). Evidence has also been provided of economic benefit flowing to the local economics [*sic*] of shooting locations through increased tourism following past filming projects (see Exhibit "I"). Evidence has also been provided in the form of U.S. Department of Commerce statistics demonstrating that visitors from South Korea are already the second highest spending group from Asian countries such that it is a reasonable assumption that spending will increase as South Korean viewers become more familiar with U.S. landmarks.

The AAO notes that the [redacted]' named by counsel above, is not the same as the [redacted]

Exhibit H is a spreadsheet-style document showing "total oversea sales actual" figures for various films by the petitioner (mostly [redacted] productions) from 2003 to 2011. Various certifications and documents support the figures provided. The figures indicate that international licensing and broadcasts have yielded about [redacted] About half of that amount, [redacted] The petitioner submitted no evidence to allow a meaningful comparison between the above figures and those for other television programs marketed internationally in East Asia.

Exhibit H also included copies of Korean-language news stories, with uncertified excerpt translations, most of them describing the popularity of the petitioner's [redacted] television series. As noted above, incomplete and/or uncertified translations cannot suffice under the regulation at 8 C.F.R.

§ 103.2(b)(3). There is no evidence of news coverage in Japanese, Chinese, or the languages of any of the other countries where, counsel claims, the petitioner's work has been highly popular.

Exhibit I consists of additional uncertified, incomplete translations of various Korean-language documents. According to the translations, some of the articles indicate that a theme park called [redacted] experienced an increase in visitors after the petitioner filmed several scenes of [redacted] there.

Figures from [redacted] indicate that visits in the summer of 2011 more than doubled from the previous year. An uncertified translation of an accompanying letter stated that the increase occurred "after [redacted] [*sic*] [redacted] sponsored [redacted]"" An uncertified translation of a news article indicated that a particular brand of cosmetics saw a 23% increase in revenue after an actor portrayed an executive of the company on one of the petitioner's television programs.

Apart from the lack of adequate translations of the documents, the articles do not show how the economic impact of the petitioner's work compares to that of others in his field. The idea of product placement, whether for a commercial product or for a tourism destination, is not a new one. Indeed, the industry abbreviation for "product placement," "PPL," appears repeatedly in the record. The petitioner cannot show he qualifies for the waiver simply by participating in product placement in this way. The articles also do not indicate whether the petitioner chose the most representative examples, or the most pronounced examples, of the claimed economic impact of his work.

Exhibit A is the petitioner's business plan for [redacted] to produce [redacted], "the [redacted]." The plan indicates that the petitioner's [redacted] "currently has [redacted]," which "is expected to increase 5 times, anticipating [redacted]." The source for this anticipated five-fold revenue increase is not clear.

Despite counsel's earlier statement that the petitioner "will film Korean language dramas in the United States for a primarily South Korean audience," the new business plan indicates that "English will be the main language" of the [redacted] project, and that the petitioner's "local production company will . . . continuously produce TV series targeting both US market and Asian market." The business plan further indicates that [redacted] "will re-spark the public's interest in Taekwondo," a Korean martial art. This significant shift in emphasis indicates that the petitioner's plans are not what counsel described at the time of filing the petition. A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r 1998); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971), which require that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition.

Exhibit F is a "Letter of Intent to Invest in the Production & Programming" of [redacted] indicating that [redacted] in the series, covering 70% of the show's projected budget of $300,000 per episode, with a projected run of three ten-episode

seasons. Exhibit D is a table, indicating that the [redacted] project intends to employ 2,065 actors and production crew members.

The petitioner has submitted some evidence to indicate that his films, broadcast in South Korea, have contributed to tourism within South Korea, but this does not readily extrapolate to the conclusion that those same South Korean viewers will travel to the United States to visit sites depicted in his films. On this point, it is not necessary to rely on speculation. The record shows that the petitioner has filmed in the United States before. The submitted evidence, however, does not show the economic impact of his past work in the United States, either in terms of tourism or in terms of temporary employment of United States workers in the cast and crew.

In the certified denial notice of May 31, 2012, the director noted that the petitioner's RFE response showed plans that differ fundamentally and substantially from what the petitioner had initially described. The director observed that much of the petitioner's evidence lacked translations that meet USCIS standards, and concluded that the petitioner had not shown how short-term filming projects would consistently serve the national interest.

In response to the certified decision, counsel asserts that the petitioner did not change his business plan, because "[t]he I-140 petition did state that [the petitioner] would direct films in the United States for viewers in South Korea. . . . The business plan submitted in 2012 . . . augments the I-140 petition rather than changing anything in the I-140 petition." That plan indicates that [redacted] will be a primarily English-language project, and that the petitioner intends to create films "for the US market." Elements of the business plan resemble and overlap with what the petitioner described earlier, but this does not mean that the plan is unchanged.

Counsel contends that "[t]he opinions of multiple experts that corroborate each other can absolutely be the cornerstone of an argument for a waiver of labor certification." Counsel evidently refers, here, to the four witness letters that accompanied the petitioner's initial submission. The record does not show that these four letters represent any kind of consensus within the petitioner's field.

Furthermore, the letters contain numerous claims of fact that lack corroborating evidence. Labeling a witness an "expert" does not give the witness's letter the weight of primary, documentary evidence. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Unsupported claims are equally lacking in weight whether they come from the petitioner himself or from one of the witnesses he selected. As previously noted, some letters show shared language, raising questions about who actually wrote the letters.

Counsel states that "there is additional corroboration in the form of numerous awards and recognition and a high level of compensation." The AAO has already described the deficiencies in that evidence. With respect to the translated documents, counsel does not dispute the director's conclusions. Instead, counsel asserts that, even without the translated documents, the record would still contain sufficient evidence to establish the petitioner's eligibility for the waiver, and for the underlying classification of an alien of exceptional ability in the arts.

The record indicates that the petitioner is an [redacted]. This occupation has substantial intrinsic merit, and provides benefits that are national in scope given the nationwide broadcasting of television programs and distribution of motion pictures. The petitioner, however, has not provided sufficient evidence to allow a meaningful comparison between himself and other television directors in order to show that he possesses a degree of expertise significantly above that ordinarily encountered in his field, or to meet the higher threshold of eligibility for a national interest waiver of the statutory job offer requirement. The petitioner has not overcome the grounds for denial set forth in the certified decision, and therefore the AAO will affirm that decision.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The director's decision to deny the petition is affirmed.